

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Christopher Lynn Ellsworth, )  
Petitioner, )  
vs. )  
State of Arizona, et al., )  
Respondents. )  
No. CV-13-02106-PHX-SPL  
**ORDER**

Before the Court is Petitioner Christopher Lynn Ellsworth’s First Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 5). The Honorable James F. Metcalf, United States Magistrate Judge, has issued a Report and Recommendation (“R&R”) (Doc. 19), recommending that the petition be denied. Petitioner has filed an Objection to the R&R. (Doc. 22.) For the reasons that follow, the Court accepts and adopts the R&R, and denies the petition.

## I. Background

In July 2012, Petitioner was arrested in a hotel room located in Arizona.<sup>1</sup> In the room, police officers found 19.5 grams of methamphetamine, drug paraphernalia, and more than \$25,000 in cash. (Doc. 5-1.) On September 21, 2012, a complaint was filed in the San Carlos Apache Tribal Court, Case No. CR2012-2526, charging Petitioner with racketeering, unlawful drug use, possession of drug paraphernalia, and endangerment.

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<sup>1</sup> Specifically, Petitioner asserts that the hotel room was located on the San Carlos Apache Tribe Reservation.

1 (Doc. 5-2.) Petitioner entered into a plea agreement in which he pleaded guilty to one  
2 count of Racketeering-Unlawful Use of Dangerous Drugs and a fine, in exchange for  
3 dismissal of the remaining charges and a sentencing recommendation for no jail or  
4 probation. (Doc. 5-2.) Petitioner also entered into a settlement agreement, agreeing to  
5 forfeiture of certain confiscated funds, with the balance and other property to be returned  
6 to him or to his counsel. (Doc. 5-3.) The tribal court accepted the plea agreement,  
7 directed the payment of the fine, and ordered return of the balance of the funds to defense  
8 counsel, under the condition that it “may be used as and in evidence the same as the  
9 original currency against Defendant Ellsworth by the state of Arizona or any Federal  
10 Court in any other criminal proceedings.” (Docs. 5-2; 5-3.)

11 Prior to the conclusion of his tribal court proceedings, on August 8, 2012,  
12 Petitioner was indicted in Gila County Superior Court, Case No. CR2012-371, on charges  
13 of possession of dangerous drugs for sale, possession of paraphernalia, and use of  
14 dangerous drugs. (Doc. 5-4.)

15 Following sentencing in tribal court, Petitioner filed a motion to dismiss in state  
16 court arguing that his state court prosecution was barred by his right against double  
17 jeopardy under state and federal law. (Doc. 5-1.) The state court denied the motion. (Doc.  
18 5-8.) Petitioner filed a Petition for Special Action on January 29, 2013 with the Arizona  
19 Court of Appeals, seeking interlocutory review on his claim that his prosecution was  
20 barred by the Double Jeopardy Clause. (Doc. 5-5.) On February 20, 2013, the Arizona  
21 Court of Appeals summarily declined to accept jurisdiction. (Doc. 5-5.) Petitioner then  
22 sought review of that order by the Arizona Supreme Court, which was summarily denied.  
23 (Doc. 5-5.)

24 Petitioner ultimately proceeded to trial, and was convicted of a lesser included  
25 offense of possession of dangerous drugs, as well as the paraphernalia and drug use  
26 charges. (Doc. 5-8.) On March 11, 2013, Petitioner was sentenced to concurrent terms of  
27 imprisonment totaling 4.5 years. (Doc. 5-8.) Petitioner did not file a direct appeal or a  
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1 petition for post-conviction relief.<sup>2</sup>

2 Petitioner filed a federal habeas petition on October 15, 2013, commencing the  
 3 instant action. (Doc. 1.) On November 18, 2013, Petitioner filed a First Amended Petition  
 4 for Writ of Habeas Corpus (Doc. 5), raising one claim for relief. Petitioner claims that his  
 5 state prosecution was barred by the Double Jeopardy Clause because he had previously  
 6 been convicted in San Carlos Apache Tribal Court for the same offenses. The petition  
 7 was fully briefed, and the Magistrate Judge issued an R&R recommending that the  
 8 petition be denied because Petitioner's claims are procedurally barred from review.

## 9 **II. Standard of Review**

10 The Court may accept, reject, or modify, in whole or in part, the findings or  
 11 recommendations made by a magistrate judge. *See* 28 U.S.C. § 636(b)(1). The Court  
 12 must undertake a *de novo* review of those portions of the R&R to which specific  
 13 objections are made. *See id.*; Fed. R. Civ. P. 72(b)(3); *United States v. Reyna-Tapia*, 328  
 14 F.3d 1114, 1121 (9th Cir. 2003). However, a petitioner is not entitled as of right to *de*  
 15 *novo* review of evidence and arguments raised for the first time in an objection to the  
 16 R&R, and whether the Court considers the new facts and arguments presented is  
 17 discretionary. *United States v. Howell*, 231 F.3d 615, 621-622 (9th Cir. 2000).

## 18 **III. Discussion**

19 Petitioner has objected to the R&R's finding that his claim is procedurally  
 20 defaulted and barred from review. Petitioner's arguments culminate into one primary  
 21 point: he contends that because the state court lacked jurisdiction to convict him, his  
 22 conviction was invalid from the onset and he was therefore not required to comply with  
 23 the state rules to exhaust his claims. This argument is without merit.

24 Here, Petitioner is seeking federal habeas relief from this Court under 28 U.S.C. §  
 25 2254. While Petitioner argues that he should not have been required to exhaust state  
 26 remedies because his conviction was inherently unfair or unconstitutional in the first  
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28 <sup>2</sup> Although Petitioner indicates in his petition that he filed a direct appeal, the reference refers to the interlocutory special action petition. (Doc. 5 at 2-4.)

1 instance, that theory does not *void ab initio* the requirements that must be satisfied in  
 2 order to obtain federal habeas review and relief.

3 A federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, which  
 4 affords relief to a person in custody pursuant to the judgment of a state court in violation  
 5 of the Constitution and laws of the United States, is governed by the Antiterrorism and  
 6 Effective Death Penalty Act of 1996 (“AEDPA”).<sup>3</sup> 28 U.S.C. § 2244. Under the AEDPA,  
 7 a federal court may not grant habeas relief if the petitioner has failed to exhaust his claim  
 8 in state court. 28 U.S.C. § 2254(b)(1) & (c); *O’Sullivan v. Boerckel*, 526 U.S. 838, 839  
 9 (1999). “[A] petitioner fairly and fully presents a claim to the state court for purposes of  
 10 satisfying the exhaustion requirement if he presents the claim: (1) to the proper forum, (2)  
 11 through the proper vehicle, and (3) by providing the proper factual and legal basis for the  
 12 claim.” *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005) (internal citations  
 13 omitted). A petitioner must present his claims to the state’s highest court in a  
 14 procedurally appropriate manner. *O’Sullivan*, 526 U.S. at 848. A petitioner “must give  
 15 the state courts one full opportunity to resolve any constitutional issues by invoking one  
 16 complete round of the State’s established appellate review process.” *Id.* at 845. “[C]laims  
 17 of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona  
 18 Court of Appeals has ruled on them” either on direct appeal or through appropriate post-  
 19 conviction relief. *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *Roettgen v.*  
 20 *Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). If a petitioner fails to invoke the required  
 21 procedure, exhaustion is not satisfied even if the petitioner raises the claim through an  
 22 alternative procedure. *See e.g., Roettgen*, 33 F.3d at 38.

23 As the Magistrate Judge correctly found, Petitioner did not exhaust his claim, and  
 24 the claim is therefore procedurally barred from review by this Court. While a petition for  
 25 special action is the appropriate vehicle to obtain judicial appellate review of an  
 26 interlocutory double jeopardy claim, *see State v. Moody*, 94 P.3d 1119, 1133 (Ariz. 2004)

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27       <sup>3</sup> The AEDPA applies to cases that were filed after its effective date, April 24, 1996.  
 28 *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997).

1 (citing *Nalbandian v. Superior Court In and For County of Maricopa*, 786 P.2d 977, 981  
 2 (Ariz. Ct. App. 1989)), the Arizona Court of Appeals did not review the claim on its  
 3 merits and declined to exercise jurisdiction over the petition. Therefore, the special action  
 4 petition did not serve to fairly present Petitioner's claims for purposes of the exhaustion  
 5 requirement. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Roettgen, supra*.  
 6 Petitioner also did not present his claim on direct appeal or in post-conviction relief  
 7 proceedings following his conviction, and the availability of interlocutory special action  
 8 review did not preclude him from presenting his double jeopardy claim in those forums at  
 9 that time. *See State v. Felix*, 149 P.3d 488, 490 (Ariz. Ct. App. 2006). Cf. 28 U.S.C. §  
 10 2254(b)(1)(B) (an exception to the exhaustion requirement exists where there is an  
 11 absence of an available state corrective process or circumstances exist that render the  
 12 process ineffective).

13 While Petitioner challenges jurisdictional jurisprudence and the fairness of the  
 14 system, he does not assert any basis to establish cause for the procedural default of his  
 15 claims, nor does he maintain a claim of actual innocence. *See Coleman v. Thompson*, 501  
 16 U.S. 722, 731 (1991) (discussing “cause” and “prejudice”); *Schlup v. Delo*, 513 U.S. 298,  
 17 327 (1995) (discussing “fundamental miscarriage of justice”). Therefore, finding his  
 18 claim is procedurally barred from review, the Court will adopt the R&R recommending  
 19 that the petition be denied. Accordingly,

20 **IT IS ORDERED:**

- 21 1. That Magistrate Judge's Report and Recommendation (Docs. 19) is  
 22 accepted and adopted by the Court;
- 23 2. That the First Amended Petition for Writ of Habeas Corpus pursuant to 28  
 24 U.S.C. § 2254 (Doc. 5) is denied and dismissed with prejudice;
- 25 3. That a Certificate of Appealability is denied because the dismissal of the  
 26 First Amended Petition is justified by a plain procedural bar and jurists of reason would  
 27 not find the procedural ruling debatable; and

28 / / /

4. That the Clerk of Court shall **terminate** this action.

Dated this 24th day of September, 2015.

Steven P. Logan  
Honorable Steven P. Logan  
United States District Judge